

No. 23A____
*** CAPITAL CASE ***

In the Supreme Court of the United States

ARELI ESCOBAR,

Petitioner,

v.

STATE OF TEXAS

Respondent.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF
CERTIORARI FROM DECEMBER 26, 2023 TO JANUARY 25, 2024

To the Honorable Samuel A. Alito, Jr.:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner Areli Escobar respectfully requests that the time to file a petition for a writ of certiorari be extended 30 days from December 26, 2023, to and including January 25, 2024. On September 27, 2023, the Court of Criminal Appeals of Texas issued a published opinion on remand after this Court granted an earlier petition, vacated the judgment, and remanded for further review. App. L, *infra*. Absent an extension, the petition would be due on December 26, 2023. This application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. Aside from agreeing that Mr. Escobar is entitled to habeas relief and that the forthcoming petition should be granted, the State does not oppose the extension request. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257 to review this case.

Background

1. Petitioner Areli Escobar was convicted of capital murder in May 2011, and the trial court set punishment at death pursuant to the jury's answers to special issues submitted under Texas law. His conviction and sentence were affirmed on direct appeal. *Escobar v. State*, No. AP-76,571 (Tex. Crim. App. Nov. 20, 2013) (not designated for publication). His initial application for habeas corpus in state court was subsequently denied.

Mr. Escobar's trial convictions were obtained largely based on DNA evidence that was presented to the jury. But in June 2016, the Austin Police DNA lab—the lab that conducted the DNA testing in Mr. Escobar's case, and the lab whose employees testified to the jury about the soundness of the DNA evidence presented to the jury—suspended operations after an independent audit conducted by the Texas Forensic Science Commission uncovered grave issues that called into serious question the reliability of the lab's work. Based in part on these newly discovered issues, Mr. Escobar filed a second state habeas application, raising six claims related to the closure of the DNA lab, scientific developments pertaining both to DNA testing and latent fingerprint analysis, and issues related to the cell tower and cell phone record evidence presented at trial. The Court of Criminal Appeals of Texas (CCA) agreed that these claims raised serious questions, so it remanded the case to the state habeas trial court for further proceedings on five of the six claims presented in the application.

The state habeas trial court held an evidentiary hearing and considered voluminous record evidence, and on December 31, 2020, recommended granting relief. In relevant part, the state habeas trial court found that the DNA evidence the State relied on and the testimony from the lab's experts that was presented to support that evidence was scientifically unreliable, false, and misleading. App. B, *infra*, at 1-2 (Findings of Fact and Conclusions of Law (Tex. Dist. Ct. Dec. 31, 2020)). The trial court found that the evidence was critical to the case, and that it was more likely than not that without it, the State would not have secured a conviction against Mr. Escobar. *Id.* at 61-62. Thus, the trial court concluded, the State's use of the false, misleading, and unreliable DNA evidence violated Mr. Escobar's constitutional rights to due process under both the state and federal Constitutions, and the court found that Mr. Escobar was entitled to habeas relief. *Id.* at 62-64.

The State *agreed* with the district court's factual conclusion that the DNA evidence was unreliable, false, and misleading, and also with the finding that Mr. Escobar was entitled to relief on his due process claim because a jury would more likely than not have found that the State failed to meet its prosecutorial burden without that evidence. All agreed—the state habeas trial court, Mr. Escobar, and the State—that the “State's use of unreliable, false, or misleading DNA evidence to secure Mr. Escobar's conviction violated fundamental concepts of justice” and “Mr. Escobar's right to due process as guaranteed by the United States and Texas Constitutions.” *Id.* at 64.

Despite the agreement of the prosecution, Mr. Escobar, and the state habeas trial court, the CCA denied Mr. Escobar's application for habeas relief in a short, unpublished opinion that did not even mention the State's concession that Mr. Escobar is entitled to habeas relief. *See* App. A.

2. After the state appellate court denied relief, Mr. Escobar filed a pro se suggestion for reconsideration that the court denied. For its part, the State *also* filed a suggestion for reconsideration, which the State noted was "an unusual move," but which was warranted in the unusual posture of this application, because the "State has conceded that" Mr. Escobar "is entitled to relief." App. C, *infra*, at 1-2 (internal quotation marks omitted). Thus, the State suggested that the CCA "file and set the case and order briefing from the parties." *Id.* at 2.

The State noted that the state habeas trial court "undertook the laborious task of considering the merits of the remanded claims," which included reviewing "hundreds of exhibits and presid[ing] over a series of evidentiary hearings starting in May 2018," "culminating in closing arguments" over two-and-a-half years later "on December 3, 2020." App. C, at 3. The state habeas trial court's "lengthy findings of fact and conclusions of law" consisted of "405 paragraphs." *Ibid.*

Making its position abundantly clear, the State explained that it "ultimately concurs with the District Court that Applicant's due process rights under the laws and Constitution of Texas and under the Constitution of the United States ha[d] been violated and that [Mr. Escobar] is entitled to relief." App. C, at 4. "The possibility that the State failed to have clearly indicated its change in position [came] to its attention

because” the CCA “did not acknowledge in its Order, as is usual practice, that the State had conceded that Applicant was entitled to relief.” *Id.* at 5 & n.3 (citing cases). The State suggested that it had “much to offer” the court “in terms of analysis of the facts, the law, and the failures in the forensic science that supported the conviction, but procedurally could only provide a brief” if the CCA “requests it.” *Id.* at 5. Thus, “[i]n the interests of justice, the State respectfully suggest[ed]” that the CCA “reconsider.” *Id.* at 4.

In a one-line mailing from the clerk, the CCA denied the State’s suggestion for reconsideration without a written order on April 4, 2022. App. D, *infra*.

3. Mr. Escobar filed a petition for a writ of certiorari before this Court on June 24, 2022. App. E, *infra*. The State agreed with the petition, filing a response in support on September 28, 2022—confessing error, arguing that the State could no longer stand behind the conviction, and that summary reversal was warranted. App. F, *infra*. Three amicus curiae briefs were also filed in support of the petition—by Former State Attorneys General, United States Attorneys, and Prosecutors; the American Bar Association; and The Innocence Network and The Center for Integrity in Forensic Sciences, Inc.

On January 9, 2023, this Court granted the petition, vacated the judgment, and remanded for further consideration in light of the confession of error by Texas in its brief filed on September 28, 2022. App. G, *infra*.

4. On remand, the State filed a motion with the CCA to submit supplemental briefing to the Court considering the remand. App. H, *infra*. The CCA denied the

motion. App. I, *infra*. The parties also sought to reopen the record and submit additional, exonerating evidence to the state trial court. App. J, *infra*. The CCA denied the motion and, instead, held the case for 30 days. App. K, *infra*.

Having denied the State's request to submit additional briefing and any real chance for the parties to submit additional exonerating evidence, the CCA reaffirmed the denial of relief on September 27, 2023, over the dissent of Justices Hervey, Newell, and Walker. App. L, *infra*.

First, the Texas court faulted the parties for only submitting minimal additional exonerating evidence, without mentioning that the court dismissed the parties' agreed motion to supplement the record before the state trial court. *See* App. L, at 10-13. Second, despite not having acknowledged the State's change in position in its original order, and despite this Court's clear command to consider the State's confession of error, the CCA suggested that it had been "aware of the State's position when the [original] order was handed down"—and simply declined to address it. App. L, at 14.

The court chastised the State for failing to submit anything new to explain why relief is warranted—without acknowledging that the court had *rejected* the State's request to submit additional briefing to the court. *Compare* App. L, at 15 ("And to this day, despite our holding the case for thirty days, during which time the State could have proffered its 'analysis of the facts, the law, and the failures in the forensic science that supported the conviction' that it claims it already had and that it claims was the basis for its change in position, the State has submitted nothing of the kind

to this Court.”); *with* App. I (denying State’s Motion for Leave to File Brief on the Merits after this Court’s GVR). In its minimal analysis on the merits, the CCA then proceeded to reaffirm its original reasoning, which all parties and three amici have debunked before this Court. *See* App. L, at 15-18.

Again, although the original opinion denying relief was unanimous, the opinion on remand drew the dissent of three justices. *Compare* App. A, with App. L, at 1 (Hervey, Newell, and Walker, JJ., dissented).

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari should be extended for 30 days for at least four reasons:

1. The press of other matters and coming end-of-year holidays makes the existing deadline on December 26, 2023, difficult to meet. In addition to this petition, counsel for petitioner has faced and continues to face an extraordinary set of case filing conflicts over the recent and coming period. In particular, counsel had to file a petition for a writ of certiorari in this Court in *Rafay v. Jackson*, No. 23-636, on December 4, 2023; a petition for a writ of certiorari in this Court in *Gordon v. May*, No. 23-629, on December 7, 2023; will have to file an opening brief and appendix in N.J. Superior Court, Appellate Division in *Adams v. Sanofi U.S. Services, Inc.*, MCL No. 628, on January 15, 2024; and two reply briefs and deferred joint appendixes in related but non-consolidated appeals in the U.S. Court of Appeals for the District of Columbia Circuit in *United States ex rel. O’Connor v. U.S. Cellular Corp.*, Nos. 23-7041 and 23-7044, on January 19, 2024. And counsel has had and will have to file

several other papers in federal district and state trial courts in the past and coming several weeks, related to complex mass litigation and arbitration against Cellco Partnership d/b/a Verizon Wireless. Finally, counsel has pre-planned travel for the coming Christmas and New Year holidays. The additional time requested will assist counsel in preparing a concise and well-researched petition that will be of maximum benefit to this Court.

2. In addition, undersigned counsel is co-teaching the Harvard Supreme Court Litigation Clinic during the school's Winter Term, which runs from January 2 through January 19, 2024. And if the extension is granted, the clinic will be working on this petition with undersigned counsel. Thus, granting the extension would make this an ideal project for the clinic.

3. Whether or not the extension is granted, the petition will be considered during this Term—and, if the petition were granted, it would be argued this Term. The extension is thus unlikely to substantially delay the resolution of this case or prejudice any party. Indeed, the State has consented to the relief sought herein, further showing that no party will be prejudiced.

4. Finally, the Court is likely to grant the petition. The CCA failed to faithfully follow this Court's admonition that it fairly consider the State's confession of error. In fact, the CCA would not allow the State to submit any additional briefing on the topic, and denied the parties' efforts to otherwise fully present their case on remand. And as noted above, the remand decision drew the dissent of three of the CCA's justices, despite its earlier unanimous denial of relief.

When the CCA has snubbed this Court's orders in the past, it has granted further review. This Court intervened twice in the same case to directly review and reverse the CCA's denial of a death row inmate's application for state habeas relief, where the CCA failed to faithfully implement this Court's decision on remand. *Compare Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (vacating CCA's finding that capital defendant was not intellectually disabled), *with Moore v. Texas*, 139 S. Ct. 666, 667 (2019) (per curiam) (summarily reversing after CCA "subsequently reconsidered the matter but reached the same conclusion"). The Court will likely have to do so once again.

And the petition will raise significant concerns about the CCA's failure to adhere to the U.S. Constitution with regards to Mr. Escobar's due process rights. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). As the State agrees, Mr. Escobar's conviction was obtained through the introduction of false and unreliable scientific evidence, in violation of Mr. Escobar's rights to due process and to a reliable sentencing verdict under the U.S. Constitution. Specifically, as the State agrees, the DNA evidence and testimony supporting the DNA evidence presented at trial were false and scientifically unreliable due to significant quality assurance issues at the Austin Police Department and scientific developments in DNA mixture interpretation, which ultimately resulted in the lab's closure. The upshot is that the State supports the state habeas trial court's conclusion that it is more likely than not that the State would not have been able to obtain Mr.

Escobar's conviction in this case without this evidence, such that his convictions should be vacated.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for 30 days to and including January 25, 2024.

Respectfully submitted,



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